72-1611 FILE COPY

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MAY 31 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No _____

72-1611

STANLEY V. TUCKER,
Petitioner

-v-

JEAN NEAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

STANLEY V. TUCKER
Petitioner
963 Capitol Ave.
Hartford, Conn 06106
203 232-0282

SUBJECT INDEX

	Page
Table of Authorities	ii
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional & Statutory Provisions	3
Statment of The Case	4
SUBSTANTIAL REASONS FOR GRANTING THE WRIT	6
I. THE DECISION BELOW CONFLICTS WITH U. S. SUPREME CT DECISIONS	6
II. THE DISMISSAL IN THE D. C. OF APPELLANT'S CONSTITUTIONAL CHALLENGES TO THE NEWLY ENACTED "LONG ARM" STATUTES OF CALIF. CONFLICTS WITH LYNCH	7
III. THERE IS ALINE OF DECISIONS IN THE FEDERAL COURTS THAT HOLD APPELLANT'S APPEAL WAS TIMELY	9
IV. THERE IS A LINE OF FEDERAL DECISIONS THAT HOLD UNDER THE FACTS OF THIS CASE THAT LATE FILING OF NOTICE OF APPEAL IS "QUASI-JURISDICTIONAL"	10
V. APPELLEE WAIVED NOTICE OF APPEAL BY WAIVING THE RIGHT TO FILE APPELLEE'S BRIEF	11

SUBJECT INDEX (continued) Page

VI. THE DISTRICT COURT SHOULD HAVE DENIED SUMMARY JUDGMENT IN LIGHT OF BUCKLEY v ESQUIRE 344 F Supp 1133 13

CONCLUSION 14

APPENDIX

Order of the 9th C. A. Dismissing Appeal on March 27, 1973 A1

Order of the District Court Denying Application For Extension of Time to File Notice of Appeal A1

Letter by Appell ee's Counsel Waiving right to File Answering Brief (and waiving notice of Appeal as to Timeliness) A2

Affidavit of Service By Mail Back Cov

TABLE OF AUTHORITIES

Page

1st Amendment US Constitution 3

5th Amendment U. S. CONSTITION 3

14th Amendment U S Const. 3, 8

28 USC 1254 (1) 2

28 USC 1343 4, 7

42 USC 1983 4

Rule 4 FRCP 5

TABLE OF AUTHORITIES - (continued)

	Page
Rule 60 b FRCP	2,4,5,6,10
9th C.A. Local Rule 5	6,10

FEDERAL CITATIONS

American National Bank v Taussig 7 Cir 255 F 2d 765	10
Blunt v U. S. 100 U. S. App D. C. 266	12
Burdix v U. S. 9 Cir 231 F 2d 893	12
Buckley v Esquire 344 F. Supp 1133	13
Crump v Hill 5 Cir 57 F 2d 85	11
Fraser v Doing 76 U. S. App DC 111	11
Fuentes v Shevlin 92 S Ct 1983	8
Jordan v USDC 98 U. S. App DC 160 233 F ed 362	11
Klapprott v U. S. 335 U. S. 615	2, 6
Lynch v Household Finance 405 U. S. 538	4,6,7,8
Mondakota Gas v Montana-Dakota 194 F 2d 705, 706	12

SUBJECT INDEX (continued) Page

Nobee v Union River 10
147 U. S. 165, 173

Patapoff v Vollstedts 10
267 F 2d 863

Pickering v Penn 3
151 F 2d 240

Roth v Bird 12
5 Cir. 239 F 2d 257

Snaidach v Family Finance 7
395 U. S. 337

The Astorian 11
9 Cir 57 F 2d 85

Times v Rangano 13
5 th CA 427 F 2d 219

Yanow v Weyerhauser 9, 10, 12
274 F 2d 274

CALIFORNIA CITATIONS

Calif. Civil Code Prodedure 410.10 3,4

Calif " " " 415.40 3,4

Randone v Appellate Div 8
96 Cal Rpt 709
488 P 2d 13

IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CKT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered March 27, 1973 infra Appendix A 1 .

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for then Ninth Circuit is printed in the Appendix hereto, infra A 1, the Opinion of the District Court, Northern District of California, October 20, 1972, is printed in Appendix A 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered March 27, 1973. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Where Appellant timely filed a Motion under Rule 60b and where the Ninth C. A. granted a motion to dismiss without ruling on Appellant's Rule 60B motion was Appellant denied a a fair hearing and due process under the Rule in Klapprott v U. S. 335 U.S 615.

2. Where Appellant timely filed a Notice of Appeal and timely prepared and paid for and filed the Record on Appeal and timely prepared and filed his APPELLANT's BRIEF and where Appellee waived the right to file a Brief was Appellant denied due process and equal protection of the laws by the Ninth C. A. dismissing his appeal without ruling on the merits.

3. Did the Ninth C. A. err in dismissing Appellant's Appeal without any record as to the vital issue of "excusable Neglect".

4. Where Appellant timely prepared and filed an Application For Extension of Time To File Notice of Appeal complete with allegations setting forth excusable neglect did the District Court err in denial of Appellant's Application without a finding on the vital issue of "excusable neglect".

5. Where Appellant appeared Pro Se in both District Court and in the Ninth C. A. was Appellant denied the minimum federal standard of justice as pronounced in Pickering v Penn, 151 F 2d 240.

6. Where substantial federal questions were at issue: namely the constitutionality of California's newly enacted long arm statute should the Ninth C. A. have denied the Motion To Dismiss and Proceeded with the appeal on its merits.

CONSTITUTIONAL AND STATUTORY PROVISIONS

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1. This case involves a denial of due process and equal protection of the laws under the 5th and 14th Amendments to the U. S. Constitution.

2. This case involves the vital issue of "excusable neglect" as applicable to a Rule 4b motion to extend time to file a notice of appeal.

3. This case involves the First Amendment freedom of Fathers to travel across state lines to visit their minor children residing in other states and to freely communicate by mail and to seek redress of grievances to Father and/or children by resort to the courts of the state where the children reside without the state exerting a chilling affect on the federally protected First Amendment freedom by an unconstitutional long arm statute.

4. This case involves the unconstitutionality of California's newly enacted long arm statutes CCP 410.10 and CCP 415.40.

5. This case involves Rule 60b FRCP and the denial of due process and equal protection by failure to rule on Appellant's Rule 60b motion.

STATMENT OF THE CASE

This action challenged the constitutionality of California's newly enacted long arm statutes CCP 410.10 and CCP 415.40 on grounds that said statutes permitted jurisdiction to vest where fundamental federally protected First AMendment freedoms were at stake and where Appellant had no "minimum activities" in California..

Notwithstanding Appellant's constitutional challenges timely made and properly made under the Civil Right jurisdictional statutes 28 USC 1343 and 42 USC 1983 the district court entered summary judgment adverse to Appellant.

The order in the district court is believed to have been made without knowledge or in advance of publication of the order of the UNITED STATES SUPREME COURT in LYNCH v HOUSEHOLD FINANCE 405 U. S. 538. Thus the District Court clearly acted on the premise that the civil rights jurisdictional rights statutes did not apply where property rights such as Appellant sought to vindicate were at stake. Nevertheless, the opinion by the UNITED STATES SUPREME COURT in Lynch, supra, shattered this illusion. Reexamined in light of Lynch, supra, the District Court was clearly wrong and the orders and judgments below should be vacated and reversed.

Appellant, victim of approx 40 civil and or criminal prosecutions brought maliciously in California as a result of a dirorce oriented situation, almost all of whom were dismissed,

had his minor son visiting Connecticut during the summer of 1972 and seeking medical aid for his neglected son and seeking to enroll his son in college across state lines failed to file the notice of appeal within the 30 days but timely prepared and mailed his notice of appeal along with application pursuant to Rule 4 to extend time to file notice of appeal.

Without making a ruling on the vital issue of "excusable neglect" the District Court summarilly denied the application to extend time.

Appellant timely prepared and perfected his appeal and timely prepared and filed his record on appeal and timely ppepared and filed his Appellant's Brief and Appellee filed a waiver of Appellee's Brief.

Thereupon Appellee disregarding that the District Court failed to make a ruling on the vital issue of "excusable neglect" filed a motion to dismiss and Appellant filed a Rule 60b motion based on mishandling of his notice of appeal and application for extension of time to file notice of appeal based on mishandling of said papers by the district court clerk and/or postal authorities so that said papers were mailed or routed across the nation three times travelling approx 9,000 miles before they were lodged with the district court clerk in San Francisco.

The Ninth C A summarilly dismissed the appeal by Appellant without ruling on the merits and without ruling on Appellant's Rule 60 B. motion and thus Appellant contends he was denied due process of law and equal protection of the laws.

SUBSTANTIAL REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH U. S. SUPREME COURT DECISIONS.

The primary thrust of this petition is directed toward the argument that he was denied a fair trial in the Ninth C. A. and in the District Court by granting the motion to dismiss WITHOUT RULING on Appellant's Rule 60b motion. There is no doubt but that Rule 60b was applicable under the facts herein.

Local Rule 5 - Ninth C. A. "The Federal Rules of Civil Procedure whenever relevant are adopted as part of the rules of this court."

The ruling in the Ninth C. A. denied Appellant due process and equal protection of the laws because it was contrary to decisions of the United States Supreme Ct.

For example in Klapprott v U. S. 335 U S 615 the U. S. SUPREME COURT held the power of Rule 60b permitted a default judgment to be set aside nine years later when there was a denial of a fair hearing.

Klapprott supra P 615 : "Fair hearings are in accord with elemental concepts of justice and the language of the "other reason" clause of 60b is broad enough to authorize the court to set aside the default judgment and grant Petitioner a fair hearing."

II. THE DISMISSAL IN THE DISTRICT COURT OF APPELLANT's CONSTITUTIONAL CHALLENGE TO THE NEWLY ENACTED "LONG ARM" STATUTES OF CALIFORNIA CONFLICTS WITH LYNCH.

Appellant contends that the granting of summary judgment by District Judge Alfonso J. Zirpoli is INEXCUSABLE ERROR on July 21, 1972 in light of the U. S. SUPRME COURT decision on March 23, 1972

YNCH v HOUSEHOLD FINANCE 405 US 538, printed in the March 21, 1972 issue of U. S. Law Week 40 LW 4335.

Lynch at P 542: "This Court has never adopted the distinction between personal and property rights as a guide to the contours of 1343(3) jurisdiction. Today we expressly reject that distinction."

If Judge Zirpoli made his decision in this action on July 21, 1972 "in the dark" as to the import of Lynch, supra, then he was probably the only federal judge in the U. S. who was not cognizant of the breadth and power of the due process clause of the U. S. Constitution and the Amendments thereto and of the jurisdictional power of Title 28 USC 1343 to adjudicate the due process claims of Appellant herein, namely that he had been assaulted in his property civil rights in a state court proceeding and was entitled to an opportunity to defend such rights in federal courts with proper notice of hearing.

Surely Judge Zirpoli OUGHT TO HAVE TAKEN NOTE that in state after state prejudgment statutes were falling as unconstitutional in light of Snaidach v Family Finance 395 US 337 and Lynch, supra.

Even California's pre-judgment attachment statute was not immune, CCP 537, was in 1971 declared unconstitutional in light of Snaidach, supra, see Randone v Appellate District of Sup. Ct of Sacramento 96 Cal Rpt 709, 488 P 2d 13.

If there was ever any room for doubt on the part of Judge Zirpoli in light of matters set forth above that doubt was permanently laid to rest in Fuentes v Shevlin 92 C S. Ct 1983, June 12, 1972.

Fuentes P 1986; "A stove, stereo, table, bed and other household goods for which buyers had contracted and paid substantial sums were with in protection of procedural due process of law, whether or not they were absolute necessities of life."

USCA AMENDMENT 14.

While it is possible Judge Zirpoli was ignorant of the latest decisions yet the timing where he granted summary judgment herein July 21, 1972 CONTRARY TO DECISIONS OF THE U. S. SUPREME COURT on March 21, 1972 in Lynch, supra, and CONTRARY to the DECISION OF THE U. S. SUPREME COURT on June 12, 1972 in Fuentes, supra, clearly indicate the orders and/or judgments below must be reversed in the interests of justice.

III. THERE IS A LINE OF DECISIONS IN THE FEDERAL COURTS THAT HOLD APPELLANT's APPEAL WAS TIMELY

In this action Appellant was subject to granting of a summary judgment in violation of his due process and equal protection rights. While the notice of appeal was not filed in 30 days nevertheless within the time allowed by the rules on Sept 13, 1972 Appellant filed by mail his notice of appeal and his application based upon good cause and "excusable neglect" for extension of time to file notice of appeal.

Under the rules Appellant's mailing was timely since Appellant had until October 19, 1972 to obtain an order to extend time. Nevertheless, the papers inadvertently mailed to the District Court Clerk in Los Angeles were not filed nor file stamped but mailed back to Hartford Conn. and re-mailed to San Francisco. In San Francisco on October 20, 1972 Judge Zirpoli denied the application.

In a leading case factually similar, Yanow v Weyerhoaeuser Stamship Co 274 F 2d 274 , it was held p 275:

> "An attempted appeal may be held effective and timely notwithstanding the papers filed are given the wrong name, do not use the word "appeal" are filed in the wrong court, or othersise fail strictly to conform to the rules."

Through inadvertence, excusable neglect, mishandling by Los Angeles District Clerk and re-mailing across country over 9,000 miles before being lodged in San Francisco District Court it may be Appellant's papers "may fail to strictly conform to the rules"..... yet under the de-

cision in Yanow, supra, Appellant's appeal.....

was "effective and timely"

The dismissal of Appellant's appeal by the Ninth C. A. on March 23, 1973 was based on "lack of jurisdiction" and this decision was clearly wrong.

Yanow supra P 274: "the expiration of the term has no bearing on the power of the Appellate Court to act upon motions to dismiss appeal on the ground it was not taken within the time allowed by the rules.

FRCP Rule 60b
9th C. A. Local Rule 5

IV. THERE IS A LINE OF FEDERAL DECISIONS THAT HOLD UNDER THE FACTS OF THIS CASE THAT LATE FILING OF NOTICE OF APPEAL IS "QUASI-JURISDICTIONAL"

See Noble v Union River Logging R. Co 147 US 165, 173:

"There is another set of facts which are quasi-jurisdictional"

American National Bank v Taussig 7 Cir 255 F ed 765

Patapoff v Vollstedts Inc 267 F2d863

See Yanow P 282: "There is a considerable body of authority indicating that in determining whether an attempted appeal has been accomplished

most informally drawn papers and improperly labeled documents have been held sufficient to accomplish the apparent objective of taking an appeal"

See: Fraser v Doing, 76 U.S App DC 111

V. IN THIS ACTION APPELLEE WAIVED NOTICE OF APPEAL BY WAIVING RIGHT TO FILE APPELLEES BRIEF.

On March 14, 1973 after Appellant filed his Brief on the merits the Appellee filed a letter , Appendix A2, wherein Appellee stated....

"Appellee declines to file an Answering Brief...."

Yanow, supra P 282:

> Thus a petition for rehearing has been held equivalent to a motion for new trial. Fraser v. Doing, 76 U.S. App.D.C. 111, 130 F.2d 617; The Astorian, 9 Cir., 57 F.2d 85, 87; a waiver of notice of appeal by the appellee, when filed, has been held an acceptable substitute for a regular notice of appeal, Crump v. Hill, 5 Cir., 104 F.2d 36; [10] a petition for mandamus was accepted as a sufficient notice of appeal notwithstanding it was filed in the appellate rather than the district court. Jordan v. United States District Court, 98 U.S. App.D.C. 160, 233 F.2d 362, 365; [11] an application made in the court of appeals for leave to appeal in forma pauperis has been held "an unequivocal notification of intention to appeal and therefore a 'notice of appeal' sufficient to give this court jurisdiction."

Yanow, P282 continued:

> Blunt v. United States, 100 U.S.App.D.C. 266, 244 F.2d 355, 359. See in accord Burdix v. United States, 9 Cir., 231 F.2d 893, 894; Roth v. Bird, 5 Cir., 239 F.2d 257.[12] Our decision in Mondakota Gas Co. v. Montana-Dakota Utilities Co., 194 F.2d 705, 706, is out of line with those cases, but it was expressly disapproved in Parissi v. Telechron, Inc., 349 U.S. 46, 47, 75 S.Ct. 577, 99 L.Ed. 678. More in line with the presently prevailing view is Cutting v. Bullerdick, 9 Cir., 178 F.2d 774, 775.[13]

Thus there is considerable authority as set forth above that the Appellee waived the notice of appeal in respect to timeliness by waiving the right to file Answering Brief on March 14, 1973 and thus the ruling in the Ninth C. A. on March 27, 1973 dismissing Appellant's appeal was contrary to established law and denied Appellant due process and equal protection of the laws.

The order of the ninth C. A. should be summarilly reversed and this action remanded for further pro - ceedings in accordance with the law.

VI. THE DISTRICT COURT SHOULD HAVE DENIED SUMMARY JUDGMENT IN LIGHT OF BUCKLEY V ESQUIRE INC 344 F. SUPP 1133 1972

The District Court erred in granting Summary Judgment since the record shows clearly at issue factually the contention that The Plaintiff's purported state court judgment was not entitled to full faith and credit by reason of denials of due process in state court proceedings.

> "Where it is not clear whether article is libelous article is susceptible to both defamatory and non-defamtoy references, motion for summary judgment should be denied."

Buckley v Esquire inc 344 F Supp 1133

The District Court was obligated to view the facts in the light most favorable to the party opposing the motion for summary judgment..

5th C. A. Times v Rangano 427 F 2d 219

Viewing the record below on the motion for summary judgment many inferences may be drawn favorable to the defendant-appellant and each of these alone is grounds for reversing the order granting summary judgment.

CONCLUSION

This Court should summarily reverse the decision of the Circuit Court of Appeals for the Ninth Circuit, or in the Alternative, probable jurisdiction should be noted.

Respectfully Submitted:

By_____

STANLEY V. TUCKER

APPENDIX - Order of the 9th C. A. Dismissing Appeal March 27, 1973

ORDER

Before : TRASK and CHOY, Circuit Judges.

Appellee's motion to dismiss appeal for lack of jurisdiction is granted and the appeal herein is dismissed.

UNITED STATES CIRCUIT JUDGE

Order of the District Court, N. D. of California Denying Application For Exten ion of Time to File Notice of Appeal

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The application for extension of time to file notice of appeal in the above entitled matter is DENIED.

Dated: October 20, 1972

ALFONSO J. ZIRPOLI

United States District Judge

Letter By Appellee's Counsel WAiving Right to File an Answering Brief (and Waiving Notice of Appeal as to Timeliness)

March 14, 1973 letter to Clerk 9th C. A.

" Appellee therefore declines to file an answering brief."

Very truly yours,

ANDERSON & ANDERSON

CERTIFICATE OF SERVICE BY MAIL

State of Conn)
County of Hartford) ss

I, STANLEY V. TUCKER, do hereby state that I have on this 30 th day of May 1973 served three copies of the Within Petition For Certiorari in Tucker v Neal, on the Respondent by mailing postage prepaid first class and by depositing in the U. S. mail box at Hartford this date addressed as follows:

Robert R. Anderson, Esq
621 E. Main
Santa Paula, California 93060

by_____
STANLEY V. TUCKER